

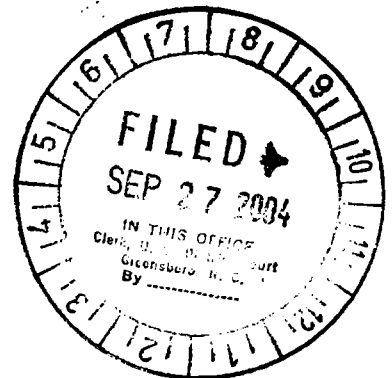
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MICHAEL ROBERT HYMAN,)
)
 Petitioner,)
)
 v.)
)
 THEODIS BECK, Secretary of)
 the Dept. of Correction,)
)
 Respondent.)

1:03CV997



J-U-D-G-M-E-N-T

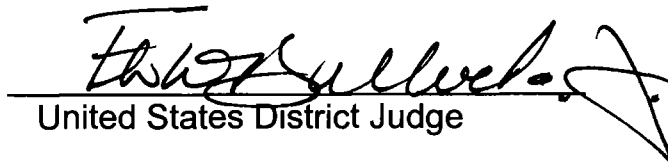
On August 25, 2004, the United States Magistrate Judge's Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636(b). No objections were received by the court within the time prescribed by the statute.

The court hereby adopts the Magistrate Judge's Recommendation.

IT IS THEREFORE ORDERED that Respondent's motion for summary judgment [Pleading No. 4] be **GRANTED**, that Petitioner's motion for habeas corpus relief [Pleading No. 1] be **DENIED**, and that this action be dismissed with prejudice.¹

¹ Rather than object to the Recommendation, Petitioner filed a Motion To Withdraw Habeas Corpus Without Prejudice (docket no. 11). The motion is an obvious response to the Recommendation because Petitioner says that the reason for the motion is to allow him "to exhaust all state court remedies." It is generally considered that a dismissal for failure to exhaust is not a disposition on the merits. See, e.g., *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000) ("A habeas petition filed in the district court after an initial habeas petition was adjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition."); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (the Supreme Court notes that none of its cases "have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.


United States District Judge

September 27 , 2004

who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition"); *Carlson v. Pitcher*, 137 F.3d 416, 420 (6th Cir. 1998)(noting that a disposition for failure to exhaust state remedies is not a disposition on the merits). *Cf. In re Goddard*, 170 F.3d 435, 438 (4th Cir. 1999)(Fourth Circuit reviews Supreme Court and circuit court cases, noting that under the AEDPA certain § 2254 and § 2255 motions that were dismissed for failure to exhaust are not counted in determining whether a later motion is second or successive).

Nevertheless, it is also the case that, in some instances, "when the prisoner fails to fully and fairly present his claims to the state courts before the time for him to do so has expired, he procedurally defaults and is foreclosed from federal habeas corpus review of those claims, absent a showing of cause and prejudice or a fundamental miscarriage of justice." *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000). Thus, while the court will deny the petition and dismiss it without prejudice, the court expresses no opinion on whether the statute of limitations has already run on Petitioner's effort to obtain federal habeas review of any claim he might exhaust in the state courts, or indeed, whether the state courts will consider that he is procedurally barred from collateral review in that forum. In short, the Motion To Withdraw Habeas Corpus Without Prejudice (docket no. 11) is DENIED AS MOOT because the dismissal here is without prejudice. Petitioner is cautioned, however, that he may return to this court presenting only fully-exhausted claims, otherwise his petition is subject to dismissal with prejudice. See *Slack v. McDaniel*, 529 U.S. at 489 (citing FED. R. CIV. P. 41(b)).